Merrily Munther (#1908)
PENLAND MUNTHER GOODRUM, CHARTERED
The Mallard Building #260
1161 W. River Street
P.O. Box 199
Boise, Idaho 83701
Telephone (208) 344-4566
Fax (208) 344-9836
File No: 5815.08
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

AHMAD GOLRANGI, Plaintiff, vs. ROMAR ELECTRIC, INC., and McALVAIN CONSTRUCTION, INC. Defendants.	Case No: CIV 04-225-S-BLW MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT BY McALVAIN CONSTRUCTION

Defendant Romar Electric, Inc., through its counsel of record, has filed its Motion for Summary Judgment against the Plaintiff. This Memorandum is filed in support of that Motion.

Standards for Determining Summary Judgment

The Federal Rule

Rule 56(b) provides for summary judgment in favor of a defendant as follows:

> A party against whom a claim is asserted may, at any time, move with or without supporting affidavits for a summary judgment....

Rule 56(c) delineates the circumstances under which a court is obligated to grant summary judgment:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Construction of the Language

The following quotation from the decision in Canada v. Boyd Group, Inc., 809 F.Supp. 771 (D.Nev. 1992) succinctly sets forth the corresponding burdens and obligations inherent in the consideration of such a motion in light of the trilogy of United States Supreme Court decisions interpreting F.R.C.P. 56.

> The moving party for summary judgment has the initial burden of showing the absence of a genuine issue of material fact. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 90 S. Ct. 1598, 26 L.Ed.2d 142 (1970); *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982). Once the movant's burden is met by presenting evidence that, if uncontroverted, would entitle the movant to a directed verdict at trial, the burden then shifts to the respondent to set forth specific facts demonstrating that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). If the factual context makes the respondent's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 1356, 89 L.Ed.2d 538 (1986); California Arch. Bldg. Prod. v. Franciscan Ceramics, 818 F.2d 1466, 1468 (9th Cir. 1987), *cert. denied*, 484 U.S. 1006, 108 S. Ct. 698, 98 L.Ed.2d 650 (1988).
>
> If the party seeking summary judgment meets this burden, then summary judgment will be granted unless there is significant probative evidence tending to support the opponent's legal theory. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 290, 88 S. Ct. 1575, 1593, 20 L.Ed.2d 569 (1968); *Commodity Futures Trading Commission v. Savage*, 611 F.2d 270 (9th Cir. 1979). Parties seeking to defeat summary judgment cannot rely on their pleadings once the movant has submitted affidavits or other similar materials. Affidavits that do not affirmatively demonstrate the personal knowledge are insufficient. *British*

Airways Bd. V. Boeing Co., 585 F.2d 946, 952 (9th Cir. 1978), *cert. denied*, 440 U.S. 981, 99 S. Ct. 1790, 60 L.Ed.2d 241 (1979). Likewise, "legal memoranda and oral argument are not evidence and do not create issues of fact capable of defeating an otherwise valid motion for summary judgment" *Id.*

A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the differing versions of the truth. *See Admiralty Fund v. Hugh Johnson & Co.*, 677 F.2d 1301, 1305-06 (9th Cir. 1982); *Admiralty Fund v. Jones*, 677 F.2d 1289, 1293 (9th Cir. 1982).

Undisputed Material Facts

For purposes of this motion, Defendant admits and states the following facts:

1. Plaintiff is of Iranian origin and is and at all times relevant to the Complaint was a licensed journeyman electrician.

2. Plaintiff was referred by his Union to Defendant Romar Electric, Inc. ("Romar"), on a call by Romar for a journeyman electrician on a project for which Romar Electric had a subcontract from Defendant McAlvain Construction, Inc. ("McAlvain"). (Affidavit of Jesse Busack); (Affidavit of Torry McAlvain);

3. Plaintiff reported for work at Romar Electric on or about June 23, 2003, and was assigned to work under the supervision of Jesse Busack. (Affidavit of Jesse Busack);

4. Plaintiff was an employee of Romar Electric. He was never an employee for McAlvain Construction. (Affidavit of Jesse Busack);

5. There is no relationship between the Defendants other than as contractor and subcontractor. The subcontract for the project on which Plaintiff was employed is appended as Exhibit "A" to the Affidavit of Torry McAlvain filed in support of this Motion. McAlvain does not have, and never has had, any ownership interest in Romar Electric or any control over its operations or labor relations. (Affidavit of Torry McAlvain; Affidavit of Marvin L. Doty).

6. McAlvain Construction Co., Inc., and Romar Electric Co., Inc., do not have and never have had any relationship other than as general contractor and subcontractor. There is not and never has been any sharing by McAlvain Construction Co., Inc., of ownership or operation of Romar Electric Co., Inc.; they do not share common offices, common record keeping, shared bank accounts or equipment. There is no financial control by one over the other. There is no common management, common directors or boards. There is no shared control by McAlvain Construction Co., Inc., of labor relations or other matters relating to the terms and conditions of employment for the employees of Romar Electric Co., Inc. At no time has McAlvain Construction Co., Inc., exercised any control over the actions of employees of Romar Electric Co., Inc., including the Plaintiff. Unlike Romar Electric whose field employees are represented by a union, McAlvain Construction is an open shop. (Affidavit of Torry McAlvain; Affidavit of Marvin L. Doty).

Argument

Title VII prohibits an "employer ... to fail or refuse to hire or to discharge any individual ... because of such individual's race, color, religion, sex, or national origin. Civil Rights Act of 1964, §701(a), 42 U.S.C.A. §2000e2(a). The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person. Civil Rights Act of 1964, §701(b), 42 U.S.C.A. § 2000e(b). Defendants concede that each of them is an employer engaged in an industry affecting commerce who has fifteen or more employees. However, Defendants submit that only Romar Electric was the employer of the

Plaintiff, and that to hold McAlvain Construction liable under Title VII, Plaintiff must establish that McAlvain was Plaintiff's employer or an agent of his employer.

More than one employer can be liable to an individual under Title VII if they each control some aspect of an individual's compensation, terms, conditions, or privileges of employment. Plaintiff must establish that the Defendants are liable as a single entity or as joint employers.

Single Entity Theory

Under a single entity theory, two nominally separate but interrelated business entities can be considered to be a single entity for purposes of determining whether an employer meets Title VII's definition of employer.

To determine whether a single employer exists, we must consider the following factors:

(1) Interrelation of operations, i.e., common offices, common record keeping, shared bank accounts and equipment.

(2) Common management, common directors and boards.

(3) Centralized control of labor relations and personnel.

(4) Common ownership and financial control.

Burdi v. Uniglobe Cihak Travel, Inc., 932 F.Supp. 1044 (N.D. Ill. 1996), quoting from *Rogers v. Sugar Tree Prods., Inc.*, 7 F.3d 577, 582 (7th Cir. 1993), quoting from *York v. Tennessee Crushed Stone Ass'n*, 684 F.2d 360, 362 (6th Cir. 1982).

The affidavits of Torry McAlvain and Marvin L. Doty, the respective owners of McAlvain and Romar, establish that the relationship between those entities is strictly that of contractor and subcontractor. There is no interrelation of operations, common management, centralized control of labor relations and personnel, and no common ownership or financial control.

> A "single employer" situation exists "where two nominally separate entities are actually part of a single integrated enterprise." Clinton's Ditch Coop. Co. . NLRB, 778 F.2d 132, 137 (2d Cir. 1985)(quoting NLRB v. Browning-Ferris Indus. of Pa., Inc., 691 F.2d 1117. 1123 (3d Cir. 1982). The single employer situation "is characterized by absence of an "arm's length relationship found among unintegrated companies." NLRB v. Al Bryant, Inc., 711 F.2d 543, 551 (3d. Cir. 1983)(quoting Local No. 627, Int'l Union of Operating Eng'rs v. NLRB, 518 F.2d 1040, 1045-46 (D.C. Cir. 1975)). Thus, two companies were a single employer where they had overlapping ownership and managerial control, and were "functionally integrated" by virtue of the fact that the garments manufactured by the one company were exclusively sold to and marketed by the other company. Lihli Fashions Corp. v. NLRB, 80 F.3d 743, 747 (2d Cir. 1996). But two companies that were in a franchisor-franchisee relationship where the franchisor's only real control over the franchisee was the franchisor's power to terminate the franchise were not a single entity. Evans v. McDonald's Corp., 936 F.2d 1087, 1090 (10th Cir. 1991). Plaintiff has presented no evidence indicating that the relationship between Midwest and UCT is anything other than an arm's length, contractual, franchisor-franchisee relationship. Midwest, like McDonald's in *Evans*, may have "stringently controlled the manner of its franchisee's operations, conducted frequent inspections, and provided training for franchise employees," *Evans*, 936 F.2d at 1090, but Midwest had no direct control over UCT's operations as would be found in an integrated enterprise.

Burdi at 1048. There is no integration of the Defendants at all. They are distinct entities without overlapping ownership or management. They cannot be deemed a single employer.

Joint Employer Theory

The "joint employer" concept does not depend upon the existence of a single integrated enterprise and therefore the above-mentioned four factor standard is inapposite. Rather a finding that companies are "joint employers" assumes in the first instance that companies are "what they appear to be"—independent legal entities that have merely "historically chosen to handle jointly...important aspects of their employer-employee relationship." NLRB v. Browning-Ferris Industries of Pa., Inc., 691 F.2d 1117 (3d Cir. 1982)(quoting from NLRB v. Checker Cab Co., 367 F.2d 692, 698 (6th Cir. 1966).

> In "joint employer" situations no finding of a lack of arm's length transaction or unity of control or ownership is required, as in "single employer" cases. As this Circuit has maintained since 1942, [I]t is rather a matter of determining which of two, or whether both, respondents control, in the capacity of employer, the labor relations of a given group of workers." NLRB v. Condenser Corp. of America, *supra*, 128 F.2d at 72 (citations omitted). The basis of the finding is simply that one employer while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer. Walter B. Cooke, 262 NLRB No. 74 (1982) (slip op. at 31). Thus, the "joint employer" concept recognizes that the business entities involved are in fact separate but that they *share* or co-determine those matters governing the essential terms and conditions of employment. C.R. Adams Trucking, Inc., 262 NLRB No. 67 (June 30, 1982) (slip op. at 5); Ref-Chem Co. v. NLRB, 418 F.2d 127, 129 (5th Cir. 1969); NLRB v. Greyhound Corp., 368 F.2d 778, 780 (5th Cir. 1966).

Browning-Ferris at 1122-1123.

Whether a defendant meets the statutory definition of "employer" poses a threshold jurisdictional matter under Title VII. *Lyes v. City of Riviera Beach, Fla.*, 166 F.3d 1332, 1340 (11th Cir. 1999) (citing *Virgo v. Riviera Beach Assoc., Ltd.*, 30 F.3d 1350, 1359 (11th Cir. 1994).

> Although *Virgo* noted that whether one corporation retained sufficient control "is essentially a factual question," 30 F.3d at 1360, this factual question pertains to a fundamental question of jurisdiction and hence is proper for the Court to decide.

Scelta v. Delicatessen Support Servs., Inc., 57 F.Supp.2d 1327, 1352 (M.D.Fla. 1999) fn. 26.

In the present instance, the employees of Romar were not trained or supervised by McAlvain, nor were they accountable to McAlvain on a daily basis. They did not receive their paychecks from McAlvain. McAlvain did not control the manner or means of the work of Romar's employees. This is evident from the fact that McAlvain's superintendent Allan Lane withdrew from the discussion with the Plaintiff in the electrical room and took the matter up with Plaintiff's supervisor at Romar. McAlvain

also did not control the manner or means of Romar's work, only the right to terminate the subcontract if the results for which McAlvain contracted were not delivered in accordance with the terms of the subcontract. (See Exhibit "A" to Affidavit of Torry McAlvain) Romar's field employees are represented by a union; McAlvain Construction is an open shop.

Finally, even if McAlvain could be considered Plaintiff's employer under TitleVII, it cannot be held liable here for the actions of Romar. For a joint employer to be held liable for discriminatory conduct, a plaintiff must show that the joint employer knew or should have known of the conduct and failed to take corrective measures within its control. Watson v. Adecco Employment Services, Inc., 252 F.Supp.2d 1347, (M.D.Fla. 2003) (citing Neal v. Manpower Int'l, Inc., 2001 WL 1923127 at 9 (N.D.Fla. September 17, 2001). McAlvain's president was not aware of the termination of Plaintiff by Romar until September 17, 2003. Romar's president and vice president were not aware of the statement by McAlvain's employee until after they determined to terminate Plaintiff and Plaintiff had been terminated.

Conclusion

For all of these reasons, we submit this Court lacks jurisdiction over Defendant McAlvain who is not and has never been Plaintiff's "employer" for Title VII purposes. Defendant McAlvain respectfully requests entry of summary judgment in its favor and against Plaintiff.

Dated this 1st day of September, 2004.

PENLAND MUNTHER GOODRUM, CHTD.

By _____
Merrily Munther - Of the Firm

CERTIFICATE OF SERVICE

I, the undersigned, certify that on the 1st day of September, 2004, caused a true and correct copy of the foregoing to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Rules of Civil Procedure, to the following person(s):

Chris Kronberg, Esq.	Hand Delivery	____
Bowen & Bailey, LLP	U.S. Mail	X
P.O. Box 1007	Facsimile	____
Boise, Idaho 83701-1007	Overnight Mail	____
Facsimile No. (208) 344-9670		

_____
Merrily Munther